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No. 02-

IN THE

Supreme Court of the United States

GARY MILLBROOK,

Petitioner,

v.

IBP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) In an action alleging unlawful discrimination in promotions, is evidence that the plaintiff was the best qualified candidate not probative of discrimination unless the difference in qualifications was so extreme that "no reasonable employer could believe that it selected the best candidate"?

(2) *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000), holds that a court may set aside a jury's finding of discrimination if *both* "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." Did the court of appeals err in overturning a jury finding of discrimination solely because the appellate court believed that the first *Reeves* requirement was met?

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Petitioner Gary Millbrook respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on February 20, 2002.

OPINIONS BELOW

The February 20, 2002 opinion of the court of appeals is reported at 280 F.3d 1169 (7th Cir. 2002), and is reprinted in Appendix A (1a-31a). The April 19, 2002 order of the court of appeals denying rehearing, which is not officially reported, is reprinted in Appendix D (38a-39a). The order of the district court denying the motion for judgment as a matter of law, which is not officially reported, is reprinted in Appendix E (40a). The judgment of the district court, entered on September 22, 2000, is reprinted in Appendix B (32a-33a). The jury verdict form was dated and filed September 21, 2000 and is reprinted in Appendix C (34a-37a).

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on February 20, 2002. A timely petition for rehearing and suggestion for rehearing en banc was denied on April 19, 2002. This court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

STATUTE, CONSTITUTIONAL PROVISION AND RULE INVOLVED

Section 703(a)(1) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Rule 50(a)(1) of the Federal Rules of Civil Procedure provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under controlling law be maintained or defeated without a favorable finding on that issue.

STATEMENT OF THE CASE

Petitioner brought this action in the United States District Court for the Central District of Illinois, alleging that because of his race he had repeatedly been denied promotion to the position of Quality Control Inspector. Millbrook, who is black, alleged that during the years from 1996 to 1998 he had applied for that position on ten different occasions, and that in every instance was rejected in favor of a non-black candidate.

Millbrook asserted that in eight of the ten instances where he applied his rejection was racially motivated. Respondent IBP, Inc., admitted that Millbrook was qualified for the

quality control position, but insisted that it had chosen the non-black candidates over Millbrook because those candidates were better qualified. Much of the evidence at trial concerned the comparative qualifications of Millbrook and the eight candidates chosen to be Quality Control Inspectors. IBP relied in part on the results of interviews with Millbrook and others, asserting, for example, that in one instance Millbrook made a poor showing in an interview because "he failed to make eye contact and did not seem confident in his answers." (App. 12a).

The jury found that IBP discriminated against Millbrook on the basis of race when it filled a Quality Control Inspector vacancy in June, 1997, selecting DeWayne Harris, a white candidate, over Millbrook. The jury awarded Millbrook $7,500 in pain and suffering, $25,000 in lost wages, and $100,000 in punitive damages. The district judge denied a motion by IBP for judgment as a matter of law.

A sharply divided court of appeals reversed. The majority opinion insisted that none of the plaintiff's evidence, which had been credited by the jury, had any probative value whatsoever. Although there was substantial evidence that petitioner was more qualified than the white applicant who was awarded the position in question, the court insisted that such evidence by its very nature could not be probative of discrimination.

> *We now hold* that where an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications *does not constitute evidence of pretext* "unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the

> plaintiff was clearly better qualified for the position at issue."

(App. 20a) (Emphasis added) (*quoting Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277 (5th Cir. 1999)).

The majority "adopt[ed] the standard . . . that comparative qualifications do not support a finding of pretext." (App. 23a). Thus, even though the jury might reasonably have concluded that petitioner was in fact more qualified, such an inference was devoid of probative significance. "[W]e are left with a case where there is *no* evidence of intentional race discrimination." (App. 29a). Proof that petitioner was in fact better qualified, the majority insisted, could not as a matter of law constitute "evidence that IBP lied about its reasons." (App. 27a). According to the panel, an employer's assertion that a discrimination plaintiff was rejected as less qualified cannot be called into question by evidence regarding the actual qualifications of the candidates involved, except where the differences in qualifications are so extraordinary as to demonstrate that "no reasonable employer could believe that it selected the best candidate." (App. 29a).

Judge Evans dissented. In barring the use of evidence of comparative qualifications, he insisted, the majority was effectively requiring a Title VII plaintiff to adduce direct evidence of discrimination.

> Discrimination today is rarely overt. Sometimes it works underground. In today's environment, it is unfair to require plaintiffs to produce smoking guns.

(App. 30a).

> [T]here was sufficient evidence to allow a reasonable jury to conclude that overall the company consistently chose the white candidate, and that in the case of Harris (who, unlike the other seven, may not have seemed to the jury to be the better candidate), the company's claim that it picked the better candidate without regard to race was a pretext to cover discriminatory behavior.

(App. 30a-31a).

Millbrook filed a timely motion for rehearing and suggestion for rehearing en banc. The motion for rehearing was denied. The suggestion for rehearing en banc was rejected by a vote of 6 to 5; Judges Ripple, Rovner, Evans, Williams and Diane Wood would have granted rehearing en banc.

REASONS FOR GRANTING THE WRIT

For more than twenty years this Court has held that a plaintiff alleging discrimination in promotions or hiring may seek to establish that claim by offering evidence that he or she was in fact better qualified than the candidate who was given the disputed position. Such evidence may persuade the trier of fact to disbelieve an employer's assertion that it rejected the plaintiff because he or she was less qualified, and to conclude that the proffered explanation was a pretext for discrimination. In recent years, however, a number of circuits have severely limited this method of proof.

The Seventh Circuit decision in this case applies the most recent and stringent version of that limitation: "comparative qualifications do not support a finding of pretext." (App. 23a)[1].

1. This view necessarily tainted the court of appeals' view that any evidence of pretext was too weak to support the jury's finding of discrimination.

(Cont'd)

Although the circuit court decisions applying this limitation suggest that there might be cases in which a disparity in qualifications would be sufficiently extreme to support a finding of discrimination, there appears to be only a single reported case in which a plaintiff was able to meet that extraordinarily demanding standard. The 6 to 5 division within the Seventh Circuit on this issue reflects a similar conflict among the courts of appeals.

I. Decisions Of This Court And Of Several Circuits Approve The Use Of Comparative Qualification Evidence To Prove Pretext

In individual promotion and hiring discrimination cases the comparative qualifications of the competing candidates is usually of central importance. After a plaintiff establishes a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the employer adduces evidence of a non-discriminatory reason for rejecting the plaintiff. Almost invariably the explanation proffered by the employer is that the plaintiff was less qualified than the individual who was awarded the position in question. Both parties offer evidence regarding the comparative qualifications of the candidates, and concerning the employer's standards for making the selection. If the trier

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(Cont'd)

This Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), only permits a court to overturn such a jury verdict if two requirements are met: (1) "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue", and (2) "there was abundant and uncontroverted independent evidence that no discrimination had occurred." 530 U.S. at 148. The court of appeals in this case overturned the jury's finding of discrimination solely because the court believed that the first requirement had been satisfied. The panel did not suggest that there was any exculpatory evidence of the sort require by *Reeves*. This portion of the opinion was squarely inconsistent with *Reeves*.

of fact concludes that the plaintiff was indeed the less qualified candidate, it will almost certainly hold that the promotion or hiring decision was non-discriminatory.

If, however, the trier of fact concludes that the employer selected the less qualified candidate, it may indeed infer that discrimination was the reason. Such an inference is not mandatory; the employer may simply have made a mistake, or may have been trying to conceal some other non-discriminatory but perhaps embarrassing motive. However, this Court has repeatedly made clear that evidence an employer promoted a less qualified candidate will be significantly probative of discrimination.

In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court held that an employer's decision to promote a less qualified candidate, although not unlawful per se, would provide support for a finding of discrimination.

> The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

450 U.S. at 259. The central holding in *Burdine* was that the plaintiff bears the burden of persuasion regarding whether an employer's proffered explanation was a pretext for discrimination. In reaching its conclusion the Court explained:

> the defendant normally will attempt to prove the factual basis for its explanation. . . . [W]e are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext.

450 U.S. at 258. In a promotion case the comparative qualifications of the applicants are ordinarily the pivotal "factual basis" in question.

On two occasions since *Burdine* this Court has discussed the sufficiency of a factual record to support a finding of discrimination in hiring or promotions. *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (hiring); *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711 (1983) (promotion). In both cases this Court relied heavily on evidence of comparative qualifications in concluding that a finding of discrimination would be upheld.[2]

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2. *Anderson*, 470 U.S. at 568-69

> the [district] court found that at the time the selection committee made its choice petitioner had been better qualified than Mr. Kinkaid to perform the range of duties demanded by the position. The court based this finding on petitioner's experience as a classroom teacher responsible for supervising schoolchildren in recreational and athletic activities, her employment as a hospital recreation director in the late 1950's, her extensive involvement in a variety of civic organizations, her knowledge of sports acquired both as a high school athlete and as mother of children involved in organized athletics, her skills as a public speaker, her experience in handling money . . . , and her knowledge of music, dance and crafts. . . . Noting that the position of Recreation Director involved more than the management of athletic programs, the court concluded that petitioner's greater breadth of experience made her better qualified for the position.

Aikens, 460 U.S. at 713-14 n.2

> Aikens . . . had more supervisory seniority and training and development courses than all but one of the white persons who were promoted above him. . . . Aikens had substantially more education than the white employees who were advanced ahead of him.

By the time of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), evidence of comparative qualifications was so widely accepted as a permissible method of proving discrimination that some lower courts mistakenly believed that it was the *only* permissible method. *E.g.*, *Young v. Lehman*, 748 F.2d 194, 198 (4th Cir. 1984)

> The rule in this circuit is that where relative qualifications are advanced as the non-discriminatory reason for an employment decision, the plaintiff has the burden of establishing that she was better qualified than the successful applicant. . . . Young had the burden of proving the reason pretextual, i.e. that she was better qualified.

In *Patterson* the trial judge instructed the jury that the black plaintiff was required to prove she was more qualified than the white applicant who had received the promotion in question.

This Court held that proof of comparative qualifications was a permissible, but not mandatory, method of establishing discrimination.

> [T]he District Court erred when it instructed the jury that petitioner had to prove that she was better qualified than the white employee who allegedly received the promotion. . . . [P]etitioner . . . must . . . have the opportunity to demonstrate that respondent's proffered reasons for its decisions were not its true reasons. . . . In doing so, petitioner is not limited to presenting evidence of a certain type. . . . Indeed, *she might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person*

> *chosen for the position*. The District Court erred, however, in instructing the jury that in order to succeed petitioner was *required* to make such a showing.

491 U.S. at 187-88 (first emphasis added).

Many circuits, not surprisingly, have followed the holdings of *Burdine* and *Patterson* that a plaintiff may establish pretext by offering proof of comparative qualifications.

In *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861 (8th Cir. 1997), the district court had refused to consider evidence regarding whether Chock or the candidates who were promoted were the most qualified. The district court reasoned:

> the Court has neither the power nor the ability to make such a business decision. In light of the myriad of suits alleging discrimination and the courts' function in reviewing these claims, the Court finds it necessary to reiterate that the federal court does not sit "as a super-personnel department that reexamines an entity's business decisions."

Chock, 113 F.3d at 864 (quoting district court opinion). But the Eighth Circuit reversed, holding that consideration of those comparative qualifications was mandatory:

> It appears from the above-quoted language that the court declined to review the relative qualifications of Chock and the persons selected for the positions. We do not condone such an approach. Where, as here, the employer contends that the selected candidate was more qualified for

> the position than the plaintiff, a comparative analysis of the qualifications is relevant to determine whether there is reason to disbelieve the employer's proffered reason for its employment decision. . . . [I]f such a comparison were to successfully challenge the employer's articulated reason, it "may serve as well to support a reasonable inference that discrimination was a motivating reason for the employer's decision." *Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir. 1997).

113 F.3d at 864; *see Hase v. Missouri Div. of Employment Sec.*, 972 F.3d 893, 897 (8th Cir. 1992) ("Plaintiff's rank, her higher examination and performance ratings and her years of experience, when compared with [the successful male candidate's] supervisory experience and job recommendations, could reasonably lead a trier of fact to infer that Defendants' proffered reasons were pretextual.")

Similarly, in the Ninth Circuit comparisons of qualifications are frequently relied on as an appropriate method of determining whether discrimination has occurred. For example, in *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595 (9th Cir. 1993), the employer claimed it had denied a promotion to the plaintiff because he assertedly had difficulty communicating in English. The trial judge determined that Odima's English language skills were sound, and thus concluded that the employer's reason was pretextual. The court of appeals affirmed that conclusion.

> The court found . . . that [the plaintiff] could speak English "adequate to conduct himself in a business or social setting." We cannot second-guess these first-hand observations. . . . Moreover, we cannot assail the district court's finding that because the

> reason was unworthy of credence, it was pretextual. . . .

991 F.2d at 600. The employer in *Odima* had asserted that it had relied as well on other differences in ability; the court of appeals insisted that each proffered reason be examined separately by the trial court. The Ninth Circuit held that on remand the trial judge was to do so by focusing on the comparative qualifications of the two candidates. "[O]n remand, the district court must compare the qualifications of Odima and the successful candidates, but only to ferret out discriminatory motives." 991 F.2d at 802.

The Third Circuit relied on evidence regarding comparative qualifications to uphold a finding of age discrimination in *Seaman v. Coplay Cement Co.*, 26 F.3d 428 (1994). The employer in *Seaman* had explained that it had laid off the plaintiff while retaining younger employees because the retained workers were more able.

> Seaman . . . introduced evidence indicating that he had more experience in the cement industry than the younger salesmen retained by U.S. Cement, and was more qualified than some of the younger salesmen. That evidence . . . could have been weighed by the jury in rejecting U.S. Cement's explanation that it had retained the other salesmen instead of Seaman because they had superior sales skills.

26 F.3d at 433.

II. Several Circuits, Including The Seventh Circuit In This Case, Effectively Bar Use Of Such Comparative Evidence To Prove Discrimination

The decisions in the Third, Eighth and Ninth Circuits, and this Court's decisions in *Burdine* and *Patterson*, are in conflict with the decisions of other circuits, including that of the Seventh Circuit in this case.

Several circuits have largely prohibited plaintiffs' use of comparative evidence. The legal standard in these circuits is avowedly asymmetrical; employers may defeat discrimination claims by proving that the plaintiff was comparatively *less* qualified, but plaintiffs (generally) cannot support such claims by demonstrating that they were *more* qualified. Appellate courts applying this rule have repeatedly overturned findings of discrimination both by juries[3] (as occurred in the instant case) and by judges following bench trials[4]. These decisions, like the opinion in the court below, suggest that there could be an extreme case in which comparative evidence would be probative. But among the scores of such decisions there appears to be only a single case in which any plaintiff succeeded in meeting this strict standard.

The standard adopted by the Seventh Circuit is extraordinarily stringent.

> *We now hold* that where an employer's proffered non-discriminatory reason for its employment

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3. *Lee v. GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000); *Alexander v. Fulton County, Georgia*, 207 F.3d 1308 (11th Cir. 2000); *Nichols v. Lewis Grocer*, 138 F.3d 563 (5th Cir. 1998); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438 (5th Cir. 1995).

4. *Odom v. Frank*, 3 F.3d 839 (5th Cir. 1993); *Sanchez v. Philip Morris Inc.*, 992 F.2d 244 (5th Cir. 1993).

> decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications *does not constitute evidence of pretext* "unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue."

(App. 20a) (Emphasis added) (*quoting Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277 (5th Cir. 1999).

Where an employer asserts (as virtually all do) that it rejected a plaintiff because he or she was less qualified, no inference can be drawn that this was not the employer's real reason even if (1) a reasonable jury *could* conclude the plaintiff was actually better qualified, (2) a reasonable jury *could* conclude that the plaintiff was *clearly* better qualified, or (3) any reasonable jury *must* conclude that the plaintiff was better qualified[5]. Only if any reasonable jury *must* conclude that the plaintiff was *clearly* better qualified could an inference of pretext be drawn. Any lesser quantum of proof would add "nothing" to the plaintiff's case. (App. 25a n.4).

This severe limitation on the use by plaintiffs of evidence of comparative qualifications derives from the Fifth Circuit decision in *Odom v. Frank*, 3 F.3d 839 (5th Cir. 1993). *Odom* was avowedly based on the premise that the holding in *Burdine* regarding the use of such comparative evidence seemed to be bad law in light of the subsequent decision in

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5. If the evidence adduced by the plaintiff were this decisive, the plaintiff would be entitled to partial summary judgement on the question of whether the plaintiff was actually the more qualified candidate, but the defendant (absent some other weighty evidence) still would be entitled to summary judgment on the merits.

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). After noting the holding in *Burdine* that a plaintiff's superior qualifications "may be probative of . . . pretex[t]," *Odom* admonished, "Recently, doubt has been cast on the continuing validity of this *Burdine* finding in light of *St. Mary's Honor Center v. Hicks*." 3 F.3d at 846 n.21. *Odom* did not explain what in *Hicks* raised questions about the vitality of *Burdine*, and the cases following *Odom* have largely ignored *Burdine*.

Some decisions, like that in the instant case, hold that evidence of comparative qualifications would be probative only if so extreme that no "*reasonable employer* could have concluded that [the plaintiff] was the better person for the job." (Emphasis added).[6] This effectively replaces the generally absolute prohibition against racial or other invidious discrimination with a sort of rational basis test; so long as a rational employer might have rejected the plaintiff, the discrimination claim will fail unless the employer was so inept as to leave a smoking gun of direct evidence. *See Bernales v. County of Cook*, 2002 WL 1022011 *3 (7th Cir.) (differences in qualifications were not "so absurd as to defy reason"); *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 103 (2d Cir. 2001) ("we cannot say that [the employer] was unreasonable in electing to offer" the position in question to candidate other than the plaintiff); *Ruiz v. Posadas de San Juan Associates*, 124 F.3d 243, 251

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6. *Bernales v. County of Cook*, 2002 WL 1022011 (7th Cir.) (*quoting Millbrook*); *Byrnie v. Town of Cromwell Board of Education*, 243 F.3d 93,103 (2d Cir. 2001) (*quoting Deines*); *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 357 (5th Cir. 2001) (*quoting Deines*); *Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d 277, 280 (5th Cir. 1999) ("disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.")

(1st Cir. 1997) ("it cannot be said that [the decision to hire another candidate rather than plaintiff] was so absurd as to defy rational belief."); *Lehman v. Prudential Insurance Co. of America*, 74 F.3d 323, 329 (1st Cir. 1996) ("We refuse to second guess Prudential's hiring decision . . . absent clearer evidence of irrationality"); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1446 (5th Cir. 1995) (plaintiff cannot question the motive behind employer's asserted promotion standards unless they are "so irrational or idiosyncratic as to suggest a cover-up.")

The stringency of this standard creates a paradox under Rule 56. In order to defeat a defendant's motion for summary judgment, a discrimination plaintiff in an individual promotion or hiring case will often have to prove disparities in qualifications so great that no rational employer could have concluded that a competing candidate was more qualified. Evidence of that magnitude would ordinarily be so decisive that no reasonable *jury* could fail to conclude that the employer in question had lied when it asserted that the plaintiff was rejected because of his or her qualifications. But that would mean in many cases that only evidence requiring summary judgment for the plaintiff (or at least partial summary judgment) would be sufficient to prevent summary judgment for the defendant. If that were the law, at least partial summary judgment for one of the parties would ordinarily be unavoidable, and there would often be little if any role for the trier of fact.

A similar paradox is created under Federal Rule 50. Sometimes this stringent standard references a "*no* reasonable juror" test instead of a "*no* reasonable employer" test. Under traditional Rule 50 analysis, a plaintiff need only produce sufficient evidence that *a* reasonable juror could potentially find in favor of a plaintiff to avoid a judgment as a matter of

law. However, *Millbrook* instructs a plaintiff that the only way to defeat a judgment as a matter of law brought by the defendant in a comparative qualification case is for the plaintiff to prove that his case is so strong that *no reasonable juror* could ever conclude against him.

Another line of decisions insists that a plaintiff can rely on evidence of comparative qualifications only if that evidence is so extraordinary that it would "slap [the judges] in the face."

> [U]nless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty. . . .

Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993)[7]. Still other decisions insist that evidence regarding comparative qualifications (when offered by a plaintiff) must be

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7. The slap-in-the-face standard has been quoted or otherwise reiterated in more than a dozen later appellate decisions. *Walker v. Prudential Property and Casualty Ins. Co.*, 286 F.3d 1270, 1277 (11th Cir. 2002); *Bernales*, 2002 WL 1022011 *2; *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001); *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001); *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 565 (5th Cir. 2001); *Alexander v. Fulton County, Georgia*, 207 F.3d 1303, 1340 (11th Cir. 2000); *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1319 (10th Cir. 1999); *Deines v. Texas Dept. of Protective and Regulatory Services*, 164 F.3d at 280; *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998); *Ruiz v. Posadas de San Juan Associates*, 124 F.3d 243, 251 (1st Cir. 1997); *Lehman v. Prudential Insurance Co. of America*, 74 F.3d 323, 329 (1st Cir. 1996); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1996); *see Odom*, 3 F.3d at 847 (plaintiff's "qualifications [do not] leap from the record and cry out to all who would listen that he was vastly . . . more qualified.")

"overwhelming"[8] or "cry out"[9] or show that the plaintiff was "clearly" better qualified[10]. On the other hand, if a defendant employer offers evidence that the person it selected was better qualified, none of these evidentiary restrictions apply to the defendant.

The avowed purpose of these demanding standards is to assure that "the bar is set high" for plaintiffs seeking to prove discrimination in this manner. *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 357 (1st Cir. 2001). This line of decisions has been uniquely successful in achieving that goal. There are more than sixty lower court decisions endorsing some form of the requirement in *Odom* and its progeny that evidence of disparities in qualifications meet a demanding standard; those cases are set out in Appendix G to this brief. We have been able to identify only a single reported case in which a court found that a plaintiff had succeeded in meeting that standard[11]. Under the decisions from *Odom* to *Millbrook* the scrutiny of comparative evidence offered by discrimination plaintiffs is strict in theory, and fatal in practice.

The courts applying this standard to dismiss discrimination claims have at times acknowledged that the plaintiff in question might well have been more qualified than the individual who was actually awarded the position in question. *E.g.*, *Vargas v. Puerto Rican-American Insurance Co.*, 52 F. Supp. 305, 310 (D. P.R. 1999) ("Even though [the

8. E.g., *Bullington v. United Air Lines, Inc.*, 186 F.3d at 1319.

9. *Price v. Federal Express Corp.*, 283 F.3d 715, 723 (5th Cir. 2002).

10. *E.g.*, *Scott*, 148 F.3d at 508.

11. *Dudley v. Wal-Mart Stores, Inc.*, 931 F. Supp. 773, 805-06 (M.D. Ala. 1996) (claim of plaintiff Easter).

plaintiff in this age discrimination case] may be eminently more qualified than [two younger workers who were promoted instead], that fact by itself is insufficient to create a genuine issue as to whether [the employer's] proffered reason was a pretext.")[12] The differences in qualifications which the courts have deemed without probative value span the spectrum of skills, abilities, and requirements relied on by employers in making promotion and hiring decisions. Thus plaintiffs have been unable to rely on evidence that they had more education[13], more administrative, managerial, or other experience[14], more consistent attendance[15], more

12. *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) (47-year-old female plaintiff "may even be justified in believing she was more qualified than [33-year-old man who received the disputed promotion]"); *Denney v. City of Albany*, 247 F.3d 1172, 1188 (11th Cir. 2001) ("one perhaps could argue that [plaintiff] was indeed the best candidate on paper"); *Byrnie v. Town of Cromwell Public Schools*, 73 F. Supp. 2d 204, 213 (D. Ct. 1999) ("we must concede that plaintiff had better objective 'paper' credentials"); *Oliver v. United States of America, Department of Defense*, 44 F. Supp. 2d 621, 825 (W.D. Tex. 1999) ("[a]t best the evidence shows that plaintiff was merely better . . . qualified").

13. *Price v. Federal Express Corp.*, 283 F.3d 715, 718, 722 (5th Cir. 2002) (black plaintiff had college degree required in written job specifications; successful white applicant did not); *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998) (54-year-old plaintiff in ADEA case had Ph.D., M.A. and law degree; successful 33-year-old applicant had only law degree); *Mustafa v. State of Nebraska Department of Correctional Services*, 196 F. Supp. 2d 945, 953-54 (D. Neb. 2002) (black plaintiff had college degree, successful white applicant did not).

14. *Price v. Federal Express Corp.*, 283 F.3d 715, 722-23 (5th Cir. 2002) (only plaintiff had the 5 years of law enforcement experience required for the job); *Cofield v. Goldkist, Inc.*, 267 F.3d

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seniority[16], higher test scores[17], better performance evaluations[18], better communication skills[19], and greater technical knowledge[20]. When such differences in qualifications favor the candidate selected by an employer, courts often regard that fact as so conclusive as to require an award of summary judgement to the defendant. But when such differences favor the plaintiff, many circuits dismiss them as devoid of probative significance.

The circuit courts that limit use by plaintiffs of evidence of comparative qualifications are themselves further divided about two issues. First, there is a conflict among these circuits regarding whether the judiciary, or a jury, should decide

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1264, 1268 (11th Cir. 2001) (plaintiff had 15 years of managerial experience, successful candidate had less than 8 years); *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001) (only plaintiff had supervisory experience); *Alexander v. Fulton County, Georgia*, 207 F.3d 1303, 1341 (11th Cir. 2000) (only plaintiff had administrative experience); *Ellenbogen v. Projection Video Services, Inc.*, 2001 WL 736774 *7-*8 (S.D.N.Y.) (plaintiff's experience "was clearly more extensive"); *Humphrey v. Potter*, 162 F. Supp. 1354, 1362-63 (S.D. Fla. 2001) (plaintiff had two years experience in the position in question; the successful candidate had only "a few weeks").

15. *Humphrey v. Potter*, 162 F. Supp. 2d 1354, 1362 (S.D. Fla. 2001).

16. *Nichols v. Lewis Grocer*, 138 F.3d 563, 568 (5th Cir. 1998); *Daniels v. Home Depot, Inc.*, 2002 WL 1398643 *10 (E.D. La.); *Humphrey v. Potter*, 162 F. Supp. 2d 1354, 1362 (S.D. Fla. 2001).

17. *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001).

18. *Denney*, 247 F.3d at 1187.

19. *Odom v. Frank*, 3 F.3d 839, 846 (5th Cir. 1993).

20. *Id.*

whether a plaintiff has met the stringent standard for use of comparative evidence. Some appellate courts decide for themselves whether the differences in qualifications were great enough to be probative[21]; in other circuits the issue is whether a rational jury could find that the applicable standard had been satisfied[22]. Second, in most circuits, as in the Seventh Circuit, comparative qualification evidence which does not meet this standard is devoid of probative value in the Second Circuit, however, such evidence does have some probative value, but it is not sufficient to support a finding of discrimination unless the plaintiff adduces other, more direct evidence of discrimination[23].

The practical effect of these restrictions is to recreate the evidentiary scheme unanimously rejected by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The question in *Reeves* was whether a finding of intentional discrimination can be based on a prima facie case combined with evidence that an employer's proffered

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21. *E.g.*, *Odom v. Frank*, 3 F.3d. 839, 846 (5th Cir. 1993) ("*We find* that neither singly nor collectively do Odom's qualifications leap from the record and cry out to all who would listen that he was vastly — or even clearly — more qualified for the subject job than was Price.") (Emphasis added).

22. *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 3557 (5th Cir. 2001) (question is whether the plaintiffs adduced adequate "evidence that they were 'clearly better qualified' "); *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998) ("a plaintiff can take his case to a jury with evidence that he was *clearly better qualified*") (Emphasis in original); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1444 (5th Cir. 1995) ("[a] factfinder can infer pretext if *it* find that the employee was 'clearly better qualified' ") (emphasis added).

23. *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 103 (2d Cir. 2001).

explanation was false. Prior to *Reeves*, a number of lower courts had held that such evidence was insufficient as a matter of law, and that a plaintiff must always adduce as well some form of more direct evidence of discriminatory motive, such as derogatory remarks. *Reeves*, 530 U.S. at 140-41.

Reeves rejected that requirement.

Reeves itself involved a dismissal which a jury had found was based on the plaintiff's age. The employer asserted that it had fired Reeves because of several incidents of misconduct. Reeves in turn "made a substantial showing that [the employer's] explanation was false," 530 U.S. at 144, by offering evidence that he was not guilty of the asserted misconduct, either because the misconduct had not occurred or because that misconduct was the responsibility of others. The court of appeals deemed this evidence inherently insufficient. It insisted that a plaintiff must also offer other, direct evidence of discrimination, and overturned the jury verdict because there had been insufficient "derogatory, age-based comments" directed at Reeves. 530 U.S. at 145.

This Court held that (at least ordinarily) a plaintiff can provide sufficient support for a finding of discrimination by proving that an employer's proffered explanation was false.

> [I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. . . . [O]nce the employer's justification has been eliminated, discrimination may well be the most likely explanation. . . . Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer discriminated.

530 U.S. at 147-48 (Emphasis in original).

The decision of the court below, and the similar rule in the First, Second, Fifth, Tenth and Eleventh Circuits, resurrects the requirement of direct evidence rejected in *Reeves*. In a promotion or hiring case, "the employer's justification" will almost invariably be that the person actually promoted or hired was better qualified. Ordinarily the most (perhaps only) practicable way a plaintiff could establish "the falsity of the employer's explanation" would be to show, to the contrary, that he or she was in fact better qualified. But in most of these circuits evidence that a plaintiff was the best qualified candidate can virtually *never* establish the falsity of the employer's justification because such evidence as a matter of law has no probative value at all. Where the employer's proffered justification is that it promoted or hired the best candidate, proof of falsity is thus essentially impossible; only direct evidence of discrimination can therefore suffice. That is why the Seventh Circuit in the instant case, just like the Fifth Circuit in *Reeves*, insisted that the plaintiff adduce evidence of relevant derogatory remarks. *Compare Reeves v. Sanderson Plumbing*, 197 F.3d 688, 693 (5th Cir. 1999), *with* App. 26a ("There is absolutely no other evidence of intentional discrimination—not one racist comment, not any harassment"). The rule in the Second Circuit is little different; evidence that a plaintiff was better qualified (and that the proffered justification was thus false) will support a finding of discrimination, but *only* if the plaintiff also adduces additional, direct evidence of discrimination[24]. That, of course, is exactly the requirement that was imposed by the Fifth Circuit in *Reeves* and was rejected by this Court.

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24. *Byrnie v. Town of Cromwell, Board of Education*, 243 F.3d 93, 103 (2d Cir. 2001).

III. The Probative Significance Of Evidence Of Comparative Qualifications Is A Question Of Great Importance To The Effectiveness Of Federal Anti-discrimination Statutes

The importance of this issue is illustrated by the broad range of anti-discrimination statutes to which the restriction on comparative qualification evidence has been applied: Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, 42 U.S.C. § 1981, Title IX, federal civil rights conspiracy statutes, section 1983 actions to enforce the Fourteenth Amendment, state, city, and Puerto Rican anti-discrimination laws. Within the last eighteen months alone, that restriction has been applied in 30 reported decisions. We set out in Appendix G to this petition a listing of these cases and to the statutes involved.

The legal standards governing the method of proving intentional discrimination go to the very heart of the nation's civil rights laws and to the viability of the Equal Protection Clause. For that reason, this Court has on thirteen occasions granted certiorari to review questions regarding the respective burdens on plaintiffs and defendants in cases of asserted disparate treatment.[25] The reasons for granting review in this case of the limitations on evidence of comparative

25. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *United States Postal Serv. bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1979); *Furnco Construction Co. v. Waters*, 431 U.S. 567 (1978); *Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

a standard that in practice can virtually never be satisfied, they create different standards depending on whether the comparative evidence is offered by and favors the plaintiff or the defendant, and they effectively recreate for hiring and promotion cases the direct evidence requirement rejected by this Court in *Reeves*.

These restrictions on the use of comparative qualification evidence pose a conundrum for the United States. These restrictions seriously limit the ability of the EEOC to prove intentional discrimination, and their application was resisted by the Commission in *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438 (5th Cir. 1995). In *Patterson v. McLean Credit Union* the Solicitor General insisted that evidence regarding comparative qualifications is an appropriate method of proving discrimination in a promotion case.

> The fact-finder need only find that the preponderance of the evidence establishes that but for the consideration of her race the plaintiff would not have been denied the promotion she sought. The plaintiff may demonstrate this fact by producing evidence that she was more qualified than the candidate who was actually selected.

Brief for the United States, No. 87-107, p. 25. On the other hand, both the Department of Justice and independent federal agencies have on repeated occasions defended employment discrimination cases by invoking the line of decisions barring use of evidence regarding comparative qualifications[26].

26. *Odom v. Frank*, 3 F.3d 839 (5th Cir. 1993) (case defended by the Office of Labor Law, U.S. Postal Service); *Humphrey v. Potter*, 162 F. Supp. 2d 1354 (S.D. Fla. 2001) (defendant represented by the U.S. Attorney and the Law Department of the U.S. Postal Service); (Cont'd)

Under these circumstances it might be appropriate to invite the Solicitor General to express the views of the United States regarding the questions presented.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

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Thomesen v. West, 2001 WL 1636311 (E.D.N.Y.) (action against the secretary of Veterans Affairs); *Haire v. United States*, 101 F. Supp. 2d 478 (N.D. Miss. 2000) (defendant represented by the U.S. Attorney); *Haran v. Summers*, 2000 WL 33348734 (W.D. Tex.) (action against the Secretary of the Treasury); *Oliver v. United States of America, Department of Defense*, 44 F. Supp. 821 (W.D. Tex. 1999) (defendant represented by the U.S. Attorney); *Coblentz v. Glickman*, 1999 WL 8162666 (E.D. La. 1999) (action against the Secretary of Agriculture); *Skinner v. Brown*, 951 F. Supp. 1307 (S.D. Tex. 1996) (defendant represented by the U.S. Attorney).